



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015**

LATE TESTIMONY

ON THE FOLLOWING MEASURE:

H.B. NO. 1075, H.D. 2, S.D. 1, Proposed S.D. 2, RELATING TO HEALTH.

BEFORE THE:

SENATE COMMITTEES ON JUDICIARY AND LABOR AND ON WAYS AND MEANS

DATE: Wednesday, April 8, 2015

TIME: 9:45 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Andrea J. Armitage, Deputy Attorney General

Chairs Keith-Agaran and Tokuda and Members of the Committees:

The Department of the Attorney General provides the following comments.

This bill would create a new part in chapter 323F, Hawaii Revised Statutes (HRS), with respect to the Hawaii Health Systems Corporation (HHSC) transition of Maui regional system health care facilities to a private entity or a wholly-owned management organization of the private entity.

The Committees have posted H.B. 1075, H.D. 2, Proposed S.D. 2 for discussion. The Department has a number of comments with respect to that draft and they are enumerated below. The Department has also created a draft to transition any or all of the HHSC's health care facilities to private entities to better assure that the people of the State continue to have access to health care in their communities. The draft is attached to this testimony. Some of the major differences between the two drafts are as follows:

1. The Department's draft applies to all counties and all HHSC facilities, not only to Maui county;
2. It provides a definition for "transition completion date" and makes more clear when the State will cease, and a private entity will assume the right and responsibility, to deliver health care at an HHSC facility;
3. It exempts the transition process from the requirements of the certificate of need process in chapter 323D, part V, as we believe that would add an unnecessary layer of review to the transition process;

4. Our draft requires the regional system board to invite the Governor, the Director of Finance, and the HHSC chief executive officer to participate in all negotiations conducted by the regional system board to transition any corporation facility to a private entity. This will facilitate the reviews of the transition documents by the Attorney General and Director of Finance, as well as the approval of the transition by the Governor;
5. Both drafts makes it clear that a transitioned facility may seek funds from the State for its operating costs as a budgetary request in accordance with procedures and criteria established by the Director of Finance, up to the amount appropriated for the region in which that facility is located for the 2014 fiscal year. The Director of Finance shall review the request and may include none, some, or the entire amount requested, in the budget of the Department of Health;
6. In proposed section 323F-I, entitled "strategic commitment during term of lease," subsection (c)(3) includes psychiatry as a service line that should be extended to the region; and
7. Our draft also specifically requires that the private entity and regional system board negotiate terms for winding down and terminating the transfer agreement in the event that the ground and equipment lease is terminated before it expires or the private entity abandons or discontinues operations.

The Department's recommendations and comments about the Committees' Proposed S.D. 2 are as follows:

1. On page 5, line 3, add "89A, 89C," after "89," add "part V" after "323D," and on page 5, line 4, change "may enter into" to "may negotiate."
2. On page 5, add to line 9 after "entity wholly-owned by the private entity" a comma after "entity" and "to cease to have any responsibility for, or control over the management and operation of any facility that is transferred."
3. On page 5, lines 10 – 11, change the first sentence of section 323F-C to read: "A transition under this part shall be completed on the effective date of an operating lease described in section 323F-D, if the operating lease, including all terms specified in

section 323F-E, is between the corporation and a private entity, and approved by the governor." The second sentence on lines 13 – 16 should remain the same.

4. On page 5, lines 20 – 21, delete "or the Maui regional system board, or both, as applicable" -- the real property and fixtures/improvements on the real property, as well as the equipment, is owned by the corporation. Therefore, as long as the operating lease includes terms for leasing them, the corporation needs to be the lessor on the operating lease.
5. On page 8, line 12, add before the period, "as of the date the effective date of the operating lease."
6. On pages 8 and 9, delete subsections (b) and (c) of section 323F-G as unnecessary.
7. On page 9, change lines 19 - 20, and page 10, lines 1 – 2, to "service as a result of a transition under this part shall suffer any loss of any previously earned rights, benefits, or privileges."
8. On page 10, delete the reference to "Maui regional system" on line 9 – the reference needs to be either the private entity or its non-profit management entity because only a private entity applies for funding pursuant to this section.
9. On page 10, line 17, add the word "none" after "may include" and before the word, "some."
10. On page 11, line 2, delete "or the Maui regional system" because the regional system may no longer exist.
11. On page 11, lines 4 – 5, delete "or the Maui regional system" because the standards and conditions specified in that section are for qualifying a private entity to receive public funds, not a state entity.
12. On page 12, line 8, insert a semicolon after the word "paid," and delete the rest of line 8 and lines 9 and 10. State entities, such as the Maui regional system, do not pay taxes.
13. On page 13, line 12, add the word "none" after "may include" and before the word, "some."
14. On page 15, line 11, add "psychiatry," after "pediatrics,".

We respectfully ask the Committees to consider our comments and our draft of the bill.

Testimony of the Department of the Attorney General
Twenty-Eighth Legislature, 2015
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Attachment

A BILL FOR AN ACT

RELATING TO HEALTH.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The purpose of this Act is to ensure that the
2 people of the State continue to have access to health care
3 services in their communities. There is mounting evidence that
4 continuing to provide health care services throughout the State
5 requires more cost effective use of the State's health care
6 facilities. In addition, through economies of scale, and
7 existing shared services, equipment, staffing, administrative
8 experience, and technological expertise, private entities that
9 operate medical care facilities may be able to use the State's
10 health care facilities more economically and efficiently.
11 Accordingly, this Act reenacts the present law for transitioning
12 the facilities of the Hawaii health systems corporation to
13 private entities, with more detailed provisions for
14 discontinuing the operations, and transferring the assets of one
15 or more of the Hawaii health system corporation's facilities to
16 private entities to use to provide continued access to health
17 care services throughout the State.

1 SECTION 2. Chapter 323F, Hawaii Revised Statutes, is
2 amended by adding a new part to be appropriately designated and
3 to read as follows:

4 "PART . TRANSITION OF HAWAII HEALTH SYSTEMS CORPORATION
5 FACILITIES TO PRIVATE ENTITIES

6 §323F-A Definitions. As used in this part:

7 "Nonprofit management entity" means a nonprofit
8 organization duly established under the laws of the State, the
9 sole shareholder or member of which is a private entity, and the
10 principal purpose of which is to manage and operate a
11 transitioned facility.

12 "Private entity" means a business organization duly
13 established under the laws of the State that is authorized to
14 operate medical care facilities in the State directly or through
15 a wholly-owned nonprofit management entity.

16 "Pre-transition facility" means a facility of the
17 corporation prior to its transition into a transitioned
18 facility.

19 "Transition completion date" means the effective date of
20 the lease entered into pursuant to section 323F-D, or the date

1 specified as the transition completion date in the agreement
2 entered into pursuant to section 323F-B.

3 "Transitioned facility" means a facility of the corporation
4 for which the right and responsibility to manage, operate, and
5 otherwise provide medical care is transferred to a nonprofit
6 management entity, pursuant to this part.

7 §323F-B Transfer of right and responsibility to manage,
8 operate, and conduct business of a facility of the corporation.

9 (a) Notwithstanding any other law to the contrary, including
10 but not limited to section 27-1, part V of chapter 323D, and
11 chapters 76, 78, 89, 89A, 89C, and 171, any regional system of
12 the corporation may give notice, and initiate a process to enter
13 into an agreement with a private entity, to transfer one or more
14 of the facilities, or the assets of the facilities of the
15 corporation in its region, and the right and responsibility to
16 manage, operate and otherwise provide medical care at the
17 facility or facilities, or with the assets of the facility or
18 facilities, to the private entity or a nonprofit management
19 entity wholly-owned by the private entity.

1 (b) At minimum, the agreement entered into by the regional
2 system board and a private entity pursuant to this section shall
3 include

4 (1) A plan and schedule for completing the transfer;

5 (2) A term for the agreement that is coterminus with the
6 term of the ground and equipment lease entered into
7 pursuant section 323F-D;

8 (3) How and when the regional system and the private
9 entity will inform the public about the pending
10 transfer;

11 (4) Provisions and deadlines for the private entity, and
12 the regional system board, and representatives of the
13 corporation and the governor, to conduct and complete
14 due diligence, and to terminate the agreement at their
15 respective options;

16 (5) Provisions for winding-down operations at the
17 transitioned facility or facilities, and terminating
18 the agreement, in the event that the ground and
19 equipment lease is terminated before the lease
20 expires, or the private entity or its nonprofit

1 management entity abandons or otherwise discontinues
2 its operation of a transitioned facility;

3 (6) Provisions for sum certain commitments from the State
4 to provide annual operating support, and an annual
5 capital subsidy for the first ten years of the
6 agreement, and procedures for the private entity to
7 discontinue operations and return the transitioned
8 facility to the corporation if the legislature
9 appropriates less than the sums committed during that
10 initial ten year period;

11 (7) A ten-year business plan for the operation of the
12 transitioned facility or facilities once the transfer
13 is completed, and the private entity's assurance that
14 the nonprofit management entity shall make reasonable
15 best efforts to achieve the performance goals
16 described in the business plan;

17 (8) A provision that the transferred facilities or assets
18 shall be managed by the private entity or a nonprofit
19 management entity wholly-owned by the private entity;
20 and

1 (9) A provision that the agreement shall be enforceable by
2 the regional system or the corporation against the
3 private entity and its nonprofit management entity, in
4 the courts of the State.

5 (c) At minimum the plan and schedule included in the
6 agreement shall describe or specify

7 (1) A description of the services the private entity or
8 its nonprofit management entity will provide at the
9 transitioned facility or facilities;

10 (2) A deadline for entering into a ground and equipment
11 lease pursuant to section 323F-D;

12 (3) Provisions and deadlines for the private entity or its
13 nonprofit management entity to secure all necessary
14 permits, licenses, certifications and accreditations,
15 and satisfy all applicable federal, state and county
16 laws to deliver medical care at the transitioned
17 facility or facilities;

18 (4) Provisions and deadlines for transferring or assigning
19 Medicare and other provider agreements, business and
20 commercial licenses and registrations, contracts,
21 leases, and other assets or interests of the facility

1 or facilities being transferred to the private entity
2 or its nonprofit management entity, provided that
3 nothing in this paragraph shall require the transfer
4 or assignment of any particular asset or interest; and

5 (5) Provisions and a deadline for transferring all
6 administrative, financial and medical records and
7 information to the private entity or its nonprofit
8 management entity to enable the private entity or its
9 nonprofit management entity to deliver medical care at
10 the transitioned facility or facilities on and after
11 the transition completion date.

12 The corporation and the private entity may also specify a
13 mutually agreed to transition completion date in the agreement.

14 (d) On and after the transition completion date for the
15 transfer of one or more facilities of the corporation to a
16 private entity or its nonprofit management entity pursuant to
17 this part, the State, the corporation, and the regional system
18 board that initiated the transition process under this part
19 shall cease to have any responsibility for, or control over the
20 management and operation of the facility or facilities
21 transferred pursuant to this part.

1 §323F-C Approvals required. Transitions under this part
2 shall occur only upon the governor's approval of the lease
3 described in section 323F-D and executed by the corporation.
4 Any documents associated with a transition shall be subject to
5 review by the attorney general and the director of finance. To
6 facilitate approvals, the governor or the governor's designee,
7 the director of finance or the director's designee, and the
8 chief executive officer of the corporation, or the chief
9 executive officer's designee, shall be invited to participate in
10 all negotiations conducted by a regional system board to
11 transition any corporation facility to a private entity or its
12 nonprofit management entity.

13 §323F-D Ground and equipment lease; terms and conditions.

14 (a) Any regional system board may negotiate a fixed-term lease
15 of no less than twenty-five years, to rent the real property,
16 including all improvements and fixtures on the property, and
17 some or all of equipment and furnishings, of a facility or
18 facilities that are to be transferred to a private entity or its
19 nonprofit management entity under this part.

1 (b) The corporation and the private entity shall be the
2 parties to the lease, and the lease shall at a minimum include
3 the following terms and conditions:

4 (1) Rent for the lease shall be a nominal \$1.00 per year
5 payable in advance and in full for the term of the
6 lease;

7 (2) The lease shall not be terminable other than for good
8 cause and upon a minimum of three hundred sixty-five
9 days prior written notice to minimize disruptions in
10 the delivery of health care to the community served by
11 the transitioned facility.

12 (3) The private entity or its nonprofit management entity
13 shall have exclusive control of the use and management
14 of the leased premises, except as otherwise set forth
15 in the lease; and

16 (4) The responsibility to oversee the performance of the
17 terms of the lease shall rest with the corporation.

18 §323F-E Liabilities. (a) The State, the regional system
19 board, or the corporation, separately or collectively, but not
20 the private entity or its nonprofit management entity, shall be
21 responsible for any and all obligations incurred prior to the

1 transition completion date, by the facility or facilities
2 transferred under this part, including any accounts payable,
3 accrued paid time off, debt, capital leases, malpractice
4 liabilities, and other obligations. Any and all liabilities of
5 a pre-transition facility that were transferred to the
6 corporation upon its creation by Act 262, Session Laws of Hawaii
7 1996, and all liabilities of the pre-transition facility related
8 to collective bargaining contracts negotiated by the State, and
9 post-employment benefits of the regional system, shall remain
10 the responsibility of the State.

11 (b) All future liabilities related to or arising out of a
12 transitioned facility's or the transitioned facilities'
13 management and operations shall be the responsibility of the
14 private entity or its nonprofit management entity.

15 §323F-F Employment, wages, and benefits. (a) No later
16 than _____ days after a regional system board decides to
17 initiate the process described in section 323F-B, the
18 corporation and the unions representing employees of the
19 corporation shall meet to discuss the impact of the transition
20 of a facility on its employees.

1 (b) The private entity or its nonprofit management entity
2 shall offer all medical and nonmedical employees at a pre-
3 transition facility, who satisfy the job qualifications for
4 comparable positions and the employment requirements of the
5 private entity, employment for an initial period established by
6 the private entity or its nonprofit management entity for newly
7 hired employees, subject to any rules applicable to employees of
8 the nonprofit management entity. The private entity or its
9 nonprofit management entity may, at its sole discretion,
10 continue to employ any or all medical and nonmedical employees
11 at the transitioned facility after the initial period.

12 (c) No employee of the corporation who is separated from
13 service as a result of an agreement entered into under this part
14 shall suffer any loss of any previously earned rights, benefits,
15 or privileges.

16 (d) Subject to subsection (b), the private entity or its
17 nonprofit management entity shall take all reasonable steps
18 necessary to provide for a smooth transition of employees from
19 state employment to private employment by the private entity or
20 its nonprofit management entity at a transitioned facility.

1 §323F-G Operating support. (a) A transitioned facility
2 may seek funds from the State for its operating costs by
3 preparing a budgetary request, as those terms are defined in
4 section 37-62, in accordance with procedures and criteria
5 established by the director of finance. In no event shall the
6 amount that is requested exceed the amount appropriated for the
7 operating costs of the regional system in which the transitioned
8 facility is located for the 2014 fiscal year. The director of
9 finance shall review the transitioned facility's request, and
10 may include none, some, or all of the amount requested, in the
11 budget request of the department of health. Any appropriation
12 made in response to the request shall be subject to the
13 allotment system generally applicable to all appropriations made
14 by the legislature. The department of health shall be
15 responsible for transferring the funds allotted to the
16 transitioned facility for expenditure.

17 (b) To qualify to request funds from the State under this
18 section, a transitioned facility must satisfy the following
19 standards and conditions:

- 1 (1) Be incorporated under the laws of the State, and
2 determined and designated to be a nonprofit
3 organization by the Internal Revenue Service;
- 4 (2) Be licensed and accredited, in accordance with
5 federal, state, or county statutes, rules, or
6 ordinances, to conduct the activities for which
7 funding is sought;
- 8 (3) Have a governing board whose members have no material
9 conflict of interest and serve without compensation;
- 10 (4) Have bylaws or policies that describe the manner in
11 which business is conducted, prohibit nepotism, and
12 provide for the management of potential conflicts of
13 interest situations;
- 14 (5) Be in compliance with all of the requirements of
15 chapter 323D with respect to the transitioned facility
16 and any other health care facility it operates;
- 17 (6) Submit tax clearances from the director of taxation
18 and the Internal Revenue Service to the effect that
19 all tax returns due have been filed, and all taxes,
20 interest, and penalties levied or accrued against have
21 been paid;

- 1 (7) Submit to an annual audit, disclose revenue
2 projections, and prepare an annual internal
3 performance audit in accordance with section 323F-22;
- 4 (8) Submit its annual budget to the legislature for review
5 and approval at least twenty days prior to the
6 convening of the regular legislative session;
- 7 (9) A written assurance from the transitioned facility
8 that as long as the transitioned facility receives
9 annual operating support and a capital subsidy from
10 the State, the transitioned facility will not
11 differentially treat other health care organizations
12 with respect to reimbursements, privileges, access to
13 facilities, and like-type benefits; and
- 14 (10) Allow the corporation full access to its records,
15 reports, files, and other related documents and
16 information for purposes of monitoring, measuring the
17 effectiveness, and ensuring the proper expenditure of
18 any funds it received from the State in the
19 immediately prior fiscal year.

20 §323F-H Capital subsidy. (a) A transitioned facility may
21 seek funds from the State for its capital expenditures, as that

1 term is defined in section 37-62, for each or all of the first
2 ten years of its fixed term lease let by the corporation,
3 pursuant to section 323F-D. Each year's request for funds shall
4 be submitted to the director of finance in accordance with
5 procedures and criteria established by the director, and
6 reviewed by the director and comptroller with pertinent capital
7 planning and expenditure documents, and the capital planning
8 procedures supplied by the transitioned facility. The director
9 of finance may include none, some, or all of the amount
10 requested, in the budget request of the department of health.
11 Any appropriation made in response to the request shall be
12 subject to the allotment system generally applicable to all
13 appropriations made by the legislature. The department of
14 health shall be responsible for transferring the funds allotted
15 to the transitioned facility for expenditure.

16 (b) After the first ten years of the lease, the nonprofit
17 management entity and the private entity shall be responsible
18 for funding all capital expenditures of the transitioned
19 facility.

20 (c) To qualify to request funds from the State under this
21 section, a transitioned facility must satisfy all of the

1 standards and conditions set out in section 323F-H. In
2 addition, the transitioned facility must demonstrate that the
3 capital projects constructed, operated, and maintained with the
4 requested funds will be in compliance with all federal, state,
5 and county health care planning laws and rules, land use and
6 zoning laws and rules, environmental laws and rules, and
7 building and health codes.

8 §323F-I Strategic commitment during term of lease. (a)

9 The private entity shall be committed to supporting its
10 nonprofit management entity and its transitioned facility to
11 achieve excellence and improve access to services in the region.

12 (b) The private entity and its nonprofit management entity
13 shall establish a governance and management structure for a
14 transitioned entity that seeks to improve its performance. The
15 private entity and its nonprofit management entity shall apply
16 efficiencies of scale, consolidation of shared services, and
17 administrative and technological expertise to improve the health
18 care transitioned facility provides.

19 (c) The private entity and its nonprofit management entity
20 shall support the transitioned facility in:

- 1 (1) Expanding primary care access of the region in which
- 2 the transitioned facility is located;
- 3 (2) Recruiting and rotating specialists to fill current
- 4 service gaps;
- 5 (3) Extending the private entity's service line
- 6 coordination to the region, including but not limited
- 7 to cancer, cardiology, orthopedics, pediatrics,
- 8 psychiatry, and women's health services;
- 9 (4) Coordinating long term care patients and reducing wait
- 10 lists;
- 11 (5) Upgrading facilities and equipment as needed to
- 12 provide high quality care and to enhance patient
- 13 experience; and
- 14 (6) Incorporating the region into the private entity's
- 15 value-based contracting initiatives to better align
- 16 quality and cost initiatives."

17 SECTION 3. Section 323F-7.6, Hawaii Revised Statutes, is
18 repealed.

19 ~~["§323F-7.6 Transition of Hawaii health systems regional~~
20 ~~system or health facility to a new entity. (a) Notwithstanding~~
21 ~~any other law to the contrary, including but not limited to~~

1 ~~section 27-1 and chapter 171, any of the regional systems or~~
2 ~~individual facilities of the Hawaii health systems corporation~~
3 ~~is hereby authorized to transition into a new legal entity in~~
4 ~~any form recognized under the laws of the State, including but~~
5 ~~not limited to:~~

6 ~~(1) A nonprofit corporation;~~

7 ~~(2) A for profit corporation;~~

8 ~~(3) A municipal facility;~~

9 ~~(4) A public benefit corporation; or~~

10 ~~(5) Any two or more of the entities in paragraphs (1)~~
11 ~~through (4).~~

12 ~~A transition shall occur through the sale, lease, or transfer of~~
13 ~~all or substantially all of the assets of the facility or~~
14 ~~regional system, except for real property which shall only be~~
15 ~~transferred by lease. Any transition shall comply with chapter~~
16 ~~323D.~~

17 ~~(b) A transition shall only occur upon approval of the~~
18 ~~appropriate regional system board in the case of a regional~~
19 ~~system or individual facility transition, or upon approval of~~
20 ~~the regional system boards and the corporation in the case of~~
21 ~~the transition of the entire corporation. Any transition shall~~

~~1 be subject to legal review by the attorney general who shall~~
~~2 approve the transition if satisfied that the transition conforms~~
~~3 to all applicable laws, subject to the review of the director of~~
~~4 the department of budget and finance who shall approve the~~
~~5 transition if it conforms to all applicable financing~~
~~6 procedures, and subject to the governor's approval. In addition~~
~~7 the transition shall be subject to the following terms and~~
~~8 conditions:~~

~~9 (1) All proceeds from the sale, lease, or transfer of~~
~~10 assets shall be used for health care services in the~~
~~11 respective regional system or facility, except that~~
~~12 real property shall only be transferred by lease;~~

~~13 (2) Any and all liabilities of a regional system or~~
~~14 facility transitioning into a new entity that were~~
~~15 transferred to the Hawaii health systems corporation~~
~~16 upon its creation by Act 262, Session Laws of Hawaii~~
~~17 1996, and all liabilities of the regional system or~~
~~18 facility related to collective bargaining contracts~~
~~19 negotiated by the State, shall become the~~
~~20 responsibility of the State, and~~

~~21 (3) During the period of transition:~~

~~(A) The State shall continue to fund the provision of health care services provided for by the regional system or individual facility, and~~

~~(B) All applicable provisions of this chapter shall continue to apply.~~

~~Upon the completion of the transition of all the facilities in a regional system to a new entity, the regional system board for that regional system shall terminate; provided that if not all of a regional system's facilities are transitioned to a new entity, the existing regional system board shall not terminate but shall continue to retain jurisdiction over those facilities remaining in the regional system."]~~

SECTION 4. Each private entity that enters into an agreement under section 323F-B, Hawaii Revised Statutes, shall take reasonable steps to provide each former Hawaii health system corporation medical and nonmedical employee it hires under section 323F-F(b), Hawaii Revised Statutes, at least initial representation by the exclusive representative or an affiliate of the exclusive representative, that represented the employee under chapter 89, Hawaii Revised Statutes, while the employee was employed by the Hawaii health system corporation.

1 SECTION 5. In codifying the new sections added by section
2 2 of this Act, the revisor of statutes shall substitute
3 appropriate section numbers for the letters used in designating
4 the new sections in this Act.

5 SECTION 6. This Act shall take effect on July 1, 2015.

H.B. NO. 1075
H.D. 2
S.D. 2
AG Proposed

Report Title:

Hawaii Health Systems Corporation Facilities; Public-Private
Collaboration; Transition to Private Entity

Description:

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.